Refuse Compactor Service, Inc. *and* The United Automobile, Aerospace and Agricultural Implement Workers of America, Local 179. Cases 31–CA–18073, 31–CA–18175, 31–CA–18245, 31–CA–18287, 31–CA–18385, and 31–CA–18497

May 13, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

Questions presented to the Board in this case include: whether the judge correctly found that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to reinstate unfair labor practice strikers who unconditionally offered to return to work; whether one such striker abandoned his employment prior to the Union's request for reinstatement; and whether the judge correctly found that certain conduct by the Respondent's president, Art Nevill, did not violate Section 8(a)(1) of the Act.[1]

The Board has considered the decision and the record in light of the exceptions[2] and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions, except as set forth below, and to adopt his recommended Order,[4] as modified.

1. In exceptions, the General Counsel contends that the judge erred by failing to find that the Respondent's president, Nevill, violated Section 8(a)(1) by threatening violence against the families of picketers and by burning a picket sign in the presence of picketers. We agree with the General Counsel.

Certain of the Respondent's employees in a bargaining unit represented by the Union engaged in a lawful strike from November 17, 1989, until August 17, 1990. Nevill was involved in several confrontations with employees on the picket line during this period. Two times on a single mid-January day, he deliberately or recklessly drove a forklift into a peacefully picketing employee. On March 13, Nevill and the Respondent's vice president, Gene Butterfield, closed a gate with such uncharacteristic speed or force that it struck a picketer. Sometime after the gate incident, Nevill accused a group of picketers of whistling at his wife. In a statement laced with expletives, he told the picketers, ''If you come and bring your . . . families, I'll run over them.'' Finally, in July, Nevill burned a picket sign while yelling expletives at picketers.

The judge found, and it is not further contested here, that Nevill violated Section 8(a)(1) by his conduct in the forklift and gate-closing incidents. On the other hand, he found that the threat to run over the families of picketers lacked ''sufficient immediacy to rise to the level of a violation.'' He also found that Nevill's sign-burning was part of the routine exchange of profanity on the picket line and would not therefore tend to interfere with, restrain, or coerce employees engaged in protected activities.

Contrary to the judge, we find that both the threat of violence to picketers' families and the sign-burning were unlawful. The proper test of such conduct entails an objective assessment of its reasonable effects on employees.[5] In this case, such an assessment must include consideration of Nevill's notorious prior willingness to interfere physically with picketing activities.

In the context of such prior unlawful conduct, picketers would not likely view the threat to run over their families as lacking immediacy. On the contrary, these employees would reasonably consider Nevill's statement as a threat of continued unlawful physical retaliation against them, and they would reasonably be deterred from continuing those activities or from enlisting relatives to support them on the picket lines. Similarly, Nevill's sign-burning was not just part of the routine adversarial exchange of picket line profanities. It signaled his predeliction to go beyond mere speech in response to protected picketing activities. Regardless of whether an employer's burning of a picket sign might be noncoercive ''street theatre'' in some other circumstances, the Respondent's employees would not likely mistake Nevill's conduct as such in this case. Instead, in light of Nevill's prior unfair labor practices, employees would reasonably tend to perceive an implicit threat of physical violence in the sign-burning. In addition, at the very least, a sign-burning literally interferes with the right to picket.

[1] On October 28, 1992, Administrative Law Judge Frederick C. Herzog issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed limited exceptions, a supporting brief, and a brief in support of the judge's other findings and conclusions. The Charging Party and the General Counsel filed answering briefs to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] We note that there are no exceptions, inter alia, to the judge's findings that the Respondent violated Sec. 8(a)(5) by unilaterally implementing a merit pay plan and granting individual wage increases.

[3] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] The Respondent has excepted to the judge's failure to find that it lawfully refused to reinstate former unfair labor practice strikers. It alleges that changes in the volume and nature of its business resulted in the elimination of jobs prior to the date of the former strikers' offer to return to work. The Respondent has failed, however, to prove this defense. Accordingly, we affirm the judge's finding of an 8(a)(3) violation and we adopt his remedial recommendation that the Respondent reinstate and give backpay to the former strikers. The Respondent may seek to prove in compliance proceedings that economic events subsequent to the date of violation justify limitation of its reinstatement and make-whole liability.

[5] E.g., *Ford Bros., Inc.*, 294 NLRB 107 (1989).

Based on the foregoing, we find that the Respondent violated Section 8(a)(1) of the Act by Nevill's threat to run over the families of employees engaged in protected picketing activities and by his act of burning a picket sign in the presence of picketers.

2. The General Counsel has also excepted to the judge's failure to find that Nevill violated Section 8(a)(1) by specifically promising employees a 25-cent wage increase during a series of meetings held on November 17, 1989. The exceptions are based on the testimony of employee Genaro Hernandez, whom the judge found to be generally credible, but unreliable ''for details of a technical nature.'' We find it unnecessary to resolve this issue. Based on a composite of the testimony of Hernandez and fellow employee Regulo Catalan, the judge found that Nevill violated Section 8(a)(1) by promising to ''help'' employees. (See JD sec. III,D,2.) The promise was made in the context of a discussion of wage increases and was part of a speech aimed at deterring unionization. The Respondent does not except to this 8(a)(1) finding. Accordingly, a finding of an express unlawful promise of a specific wage increase would be cumulative and would not affect the remedy recommended by the judge.

Similarly, there is no need to find a separate 8(a)(1) violation, as urged in the General Counsel's exceptions, based on credited testimony that Nevill told employees on November 17 that supporting the Union is ''like being in Russia.'' The judge appropriately treated this and similar statements by Nevill on that day as collectively violating Section 8(a)(1) by threatening the futility of unionization.[6]

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 6.

''6. By threatening automatically to fire all employees who chose to participate in an economic strike, by threatening employees that their unionization efforts will be futile, by implicitly promising a wage increase to discourage employees from supporting the Union, by running a forklift into an employee peacefully picketing Respondent's premises, by closing a gate in such a way as to cause it to strike an employee while the employee was peacefully picketing Respondent's premises, by threatening violence against picketing employees' families, and by burning a picket sign in the presence of picketing employees, the Respondent has violated Section 8(a)(1) of the Act.''

[6] We note, however, that the judge failed to include appropriate references in the conclusions of law and in the recommended notice to several 8(a)(1) findings. We shall amend the conclusions of law and substitute a new notice to correct this oversight.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Refuse Compactor Service, Inc., Sylmar, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 1(b) and (c).

''(b) Threatening employees that their unionization efforts will be futile, or implicitly promising wage increases to employees in order to discourage their support for a union.

''(c) Running forklifts into or closing a gate on employees engaged in protected picketing, threatening violence against picketing employees' families, and burning picket signs in the presence of picketing employees.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain collectively in good faith concerning rates of pay, wages, hours, and other terms and conditions of employment with the United Automobile, Aerospace and Agricultural Implement Workers of America, Local 179, as the exclusive collective-bargaining representative for our employees in the following appropriate unit:

> Included:
>
> All full-time and regular part-time production and maintenance employees, including truck-drivers, welders, machine operators, painters, forklift drivers and fabrication employees employed by Refuse Compactor Service, Inc., at its location at 12776 Foothill Blvd., Sylmar, California.

Excluded:

Office clerical employees, sales employees, confidential employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally alter any of the terms and conditions of employment of our employees in the above-described bargaining unit.

WE WILL NOT discourage membership in or activities on behalf of the Union or any other labor organization by discharging employees or by refusing to reinstate unfair labor practice strikers who have unconditionally offered to return to work.

WE WILL NOT threaten employees with loss of employment as a result of union activities or advise employees of the futility of unionization efforts.

WE WILL NOT implicitly promise increases in wages to discourage employees from supporting the Union.

WE WILL NOT run forklifts into employees engaged in protected picketing activities, strike employees with plant gates, threaten employees' families, or burn union picket signs in front of employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL offer Augustin Godoy Lopez and all former unfair labor practice strikers immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from our discrimination against them, less any net interim earnings, plus interest.

WE WILL notify Lopez and all unreinstated unfair labor practice strikers that we have removed from our files any reference to discharge or to the refusal to reinstate and that such prior unlawful actions will not be used against them in any way.

REFUSE COMPACTOR SERVICE, INC.

Ann L. Weinman, Esq., for the General Counsel.
Reed E. Schaper, Esq. (Pepper, Hamilton & Scheetz), of Los Angeles, California, for the Respondent.
D. William Heine, Esq. (Schwartz, Steinsapir, Dohrmann & Sommers), of Los Angeles, California, for the Charging Party.

DECISION

FREDERICK C. HERZOG, Administrative Law Judge. This case was heard by me in Los Angeles, California, on June 13, 14, 18, and 19, 1991, and is based on charges filed by The United Automobile, Aerospace and Agricultrual Implement Workers of America, Local 179 (the Union) on various dates between January 23 and October 29, 1990, alleging generally that Refuse Compactor Service, Inc. (Respondent) committed certain violations of Section 8(a)(1),[1] (3),[2] and (5)[3] of the National Labor Relations Act (the Act). On June 28, 1990, the Regional Director for Region 31 of the National Labor Relations Board (the Board) issued a consolidated complaint and notice of hearing in certain of the cases set forth above, and subsequently, on March 29, 1991, the Regional Director issued an order consolidating cases, third amended consolidated complaint and notice of hearing, alleging violations of Section 8(a)(1), (3), and (5) of the Act. Respondent thereafter filed a timely answer to the allegations contained within the complaint, denying all wrongdoing, and alleging certain affirmative defenses.[4]

All parties appeared at the hearing, and were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and file briefs. Based on the record, my consideration of the briefs filed by all parties,[5] and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that Respondent is a California corporation, with an office and place of business in Sylmar, California, where at all times

[1] Sec. 8(a)(1) of the Act provides that
It shall be an unfair labor practice for an employer—
. . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
Sec. 7 of the Act provides that
Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

[2] Sec. 8(a)(3) of the Act provides that
It shall be an unfair labor practice for an employer—
. . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

[3] Sec. 8(a)(5) of the Act provides that
It shall be an unfair labor practice for an employer—
. . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
Sec. 8(d) of the Act provides that
For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, ...

[4] Each of which was either withdrawn or stricken at trial.

[5] Respondent was represented on brief by different counsel than those representing it at trial.

material it has been engaged in the business of manufacturing, selling, and servicing commercial refuse compactors, and that, in the course and conduct of its business operations, Respondent annually purchases and receives, at its facility mentioned above, goods or services valued in excess of $50,000 from sellers or suppliers located within the State of California, which sellers or suppliers receive such goods in substantially the same form directly from outside the State of California.

Accordingly, I find and conclude that Respondent is now, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is now, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *General Background and Labor Relations History*

Respondent has operated in the business described above for a number of years from its facility in Sylmar, California. In its business of manufacturing, selling, and servicing commercial refuse compactors, it employs a variety of crafts, including welders, machine operators, mechanics, installers, drivers, and helpers.

Its president and half owner is, and has been, Art Nevill. Its vice president is, and has been, Gene Butterfield.

The Union, through secret-ballot election, on or about June 23, 1989, was designated and selected by a majority of Respondent's employees as the exclusive representative, for purposes of collective bargaining, of all employees in an appropriate unit described as:

> Included:
>
> All full-time and regular part-time production and maintenance employees, including truck-drivers, welders, machine operators, painters, forklift drivers and fabrication employees employed by Respondent at its location at 12776 Foothill Blvd., Sylmar, California,
>
> Excluded:
>
> Office clerical employees, sales employees, confidential employees, managerial employees, professional employees, guards and supervisors as defined in Act.

Following the Union's certification on August 3, 1989, the parties commenced negotiations toward a first collective-bargaining agreement.

Negotiations continued until on or about November 15, 1989. Respondent then declared impasse, contrary to the Union's view that no impasse then existed.

B. *The Issues*

The principal issues in this case are:

1. Whether Respondent violated Section 8(a)(5) of the Act by unilaterally granting merit wage increases to unit employees without first affording the Union an opportunity to bargain.

2. Whether Respondent violated Section 8(a)(1) of the Act by:

(a) Statements made to employees on November 17, 1989, which were intended to reduce union support.

(b) Hitting picketing employee Regulo Catalan with a forklift in or around January 1990.

(c) Hitting picketing employee Jazzier Soriano with a gate on or about March 13, 1990.

(d) Threatening to run over picketing employees and their families on or about May 17, 1990.

(e) Burning a union picket sign in front of picketing employees in or around July 1990.

3. Whether Respondent violated Section 8(a)(1) and (3) of the Act by:

(a) Discharging picketing employee Agustin Godoy Lopez for strikeline misconduct.

(b) Failing and refusing to offer striking employees immediate reinstatement as unfair labor practice strikers or, in the alternative, as economic strikers for whom no permanent replacements were hired.

4. Whether striking employee Carlos Ramirez waived his right to reinstatement by resigning his position with Respondent during the strike.

C. *Factual Findings*

1. The alleged violations of Section 8(a)(1) at the meetings of November 17, 1989

Unit employees were scheduled to vote on whether or not to engage in a strike on November 17, 1989.

On that day, prior to the vote, Respondent conducted meetings of employees at its facility.

Employee Javier Soriano, a credible witness, testified that Nevill told employees that

> the union was like being in Russia, . . . the union wasn't going to tell him what to do in his shop . . . if [employees thought] that [they] were going to go on strike, take all [their] belongings, give [him the equipment] if [they] were planning strike.

He went on to testify that Nevill thanked him and others for their time that they would worked there, and that Nevill stated that the union was never going to come into his plant, and that he would rather spend his last cent preventing it from doing so.

Employee Genaro Hernandez, a generally credible witness,[6] testified that, at a meeting of 18–20 employees on November 17, Nevill stated they were going to be fired and replaced, and that those who later wanted to come back would have to sign a paper to keep the Union out. Hernandez also recalled that Nevill told them that they would get a raise of 25 cents per hour if they stayed out of the Union. Further,

[6] Hernandez testimony proved difficult to evaluate. Much of his difficulty may have been due to the problems of interpretation, however. While I would not rely on his testimony for details of a technical nature, I am confident that he was a truthful witness, and that his testimony, which was generally consistent with that of Soriano, is sufficiently credible.

Nevill may have told them[7] that, if they did not support the Union, they would get new and improved vacation benefits, going from 1 week of vacation after 1 year's work, to a policy of 2 weeks of vacation after 3 years up to their 10th year. He recalled that Nevill said that he would not let strangers set foot in his company. While Hernandez initially testified that he was at the same meeting as Soriano, further questioning showed that he was referring to another meeting. In any event, he denied that Nevill mentioned the Russians, or anything about a contract.

Employee Regulo Catalan, whose testimony I credit, testified that just before the vote on whether or not to strike he attended a meeting of Respondent's, together with about 8–10 employees. He recalled that Nevill cautioned them to be very careful about voting to go on strike, and that, if they voted to go on strike, he would feel sorry, but that would mean that they were automatically fired. He instructed them, in that event, to pick up their things and take them away with them. Catalan went on, with hesitation, to recall that Nevill stated, while employees were talking of a wage increase, that he would try to help employees, that Nevill said that he was never going to allow the Union to be the one giving orders in his company, and that the Union could fine them unless they signed a paper he had in his office.

Nevill testified that he never told employees he would spend his last cent to keep his plant from becoming unionized. He also denied ever telling employees that he would never let anyone come into his plant and tell him how to run his Company.

Based on their superior demeanor while testifying, I credit the testimony of Soriano and Hernandez over that of Nevill[8] on these matters.

Accordingly, I shall find and conclude that the General Counsel's credible evidence showed that prior to the strike's inception, on November 17, 1989, Respondent held a series of employee meetings aimed at reducing allegiance to the Union. Further, I shall find and conclude that Nevill told employee Javier Soriano, and others who attended a meeting on that date that supporting the Union is like ''being in Russia,'' that he ''was never going to [allow it to] come in his plant,'' and that he would ''spend his last cent'' to keep his plant from becoming unionized. Further, I shall find and conclude that Nevill told employee Genaro Hernandez, and others who attended another meeting on that date, that if they went on strike they would be fired and immediately replaced, and that Nevill promised ''help'' or wage increases to employees who stayed out of the Union.

[7] I say ''may'' because I simply cannot tell what the witness meant.

[8] Nevill made a particularly unconvincing witness. He seemed interested more in showing his impatience with the entire proceeding, and in exhibiting a superior and mocking demeanor, than in speaking truthfully and accurately. I infer that his extremely poor demeanor may have had more than a little to do with the decision by Respondent not to call him to the stand as its own witness. Because of this, I find that in any instance where counsel for the General Counsel has presented credible testimonial evidence, even if less than strong, such evidence should be credited over that which came from Nevill's testimony. As to why Respondent chose not to put other evidence into the record in its own defense, I draw no conclusion. Its absence, however, is glaring, and is important to the determination of this case, since it leaves virtually all of the General Counsel's evidence unrefuted.

2. The strike and demand for reinstatement

On or about November 17, 1989, approximately 45–50 unit employees engaged in a strike against the Respondent. Shortly after it began, approximately 25–30 unit employees abandoned the strike and returned to work for the Respondent.

On or about August 17, 1990, picketing employees ended their strike against the Respondent. Thereafter, the Union sent letters to the Respondent requesting immediate and unconditional reinstatement of these employees to their former, or substantially equivalent, positions of employment.

Respondent denied the Union's requests to grant the strikers immediate reinstatement. According to Nevill's testimony, the Respondent did not hire any permanent replacements during the strike.

3. The alleged unilateral raises

As shown above, shortly following the Union's certification on August 3, 1989, the parties began negotiations toward a first collective-bargaining agreement. One subject of the bargaining concerned creation of a merit review system. According to the testimony of Nevill, Respondent presented the Union with a written proposal on this subject. Admittedly, however, no agreement was reached on this matter.

Respondent, thus, admits that it unilaterally granted merit wage increases to unit employees during the time period in which it was engaged in collective bargaining with the Union. Respondent asserts, in justification, that it has had an ''established past practice'' of granting such merit increases to its employees. It also admits, however, that it has no formal written policies to demonstrate or evidence the existence of any such practice.

Nevill testified that Respondent's policy[9] was for employees to receive annual performance reviews. But he admitted that the reviews were often not given on the employees' respective yearly anniversaries. He also testified that employees could receive merit increases in between their yearly reviews on the recommendation of a foreman, or himself.

As described by Nevill, discretionary increases were generally granted by Respondent based on a variety of measuring criteria, such as attendance, attitude, performance, safety and bilingualism.[10] Admittedly, the criteria, like the policy, do not exist in any written form. For its part, the Union asserts the Respondent's policies fail to rise to the level of an ''established past practice.''

Nevill's testimony about the ''practice'' showed only that it was not anything more than an exercise of Respondent's discretion when employees were granted raises, or when they were reclassified, or when they were promoted.

Following the introduction of a good deal of evidence, Respondent amended its answer at trial, so as to admit the allegations relating to the alleged unilateral changes.

4. The alleged assaults on employee Catalan

Regulo Catalan, a credible witness, was employed as both a welder and a sorter prior to the strike. He testified that in

[9] At trial, Respondent's then counsel characterized Respondent's policy of granting merit wage increases as ''unpredictable.''

[10] The majority of Respondent's employees speak only Spanish. Respondent asserts that it considers bilinguilism an asset.

or about mid-January 1990 he was engaged in picketing at Respondent's North gate (the gate closest to some nearby hills) along with three other picketers.[11] Around 11 or 12 a.m., a truck arrived and parked at the curb near the gate. Its driver went into Respondent's office. A short time later, Nevill came out of the office, and, with the assistance of some workers, loaded six boxes onto a forklift. Nevill then drove the forklift toward the gate. According to Catalan, Nevill approached the gate and did not stop, slow down, or give any words of warning before proceeding into the street.

Catalan credibly testified that he was just passing in front of the gate with his picket sign as Nevill and the forklift arrived. Catalan admitted he saw Nevill coming, but testified that he did not have enough time, though he tried, after the danger became evident, to get out of the forklift's way. The boxes on the forklift struck him on his left arm. He believed the forklift was going to stop because, on prior occasions, forklift drivers other than Nevill had stopped before exiting the gate to insure the safety of the picketers. Catalan protested to Nevill that he had to allow people to get out of the way before driving through, as was usual, to which Nevill responded that he did not see Catalan.[12] Catalan credibly testified that Nevill, in fact, did have good enough visibility to see dangers ahead of him, notwithstanding the fact that the boxes carried on the forklift were about 6-feet high. He testified that he thought that Nevill saw him as he drove through the gate, and denied that he was in any way attempting to impede the progress of the forklift from exiting the gate.

Catalan further credibly testified that, later that same day, after Nevill loaded boxes onto the truck, he again boarded the forklift. At this time, the picketers were walking between the forklift and the fence which borders Respondent's facility. According to Catalan, Nevill while looking backwards, told him to move out of the way, and then, at the same moment (which he estimated to be within 3 seconds) put the forklift in reverse gear, and ran into Catalan's right leg before Catalan could pull out of the way. This time, Nevill made no comment, but merely went back into the facility on the forklift, smiling. Catalan credibly claimed that Nevill was well aware that he would struck him with the forklift, as he was looking directly at him when he did so. Catalan, however, admitted that he was not knocked to the ground, and, though he claimed to have been caused pain, that he did not recall whether or not he grabbed the spot where he claimed to have been struck.

Benjamin Rosales, employed as a welder prior to the strike, credibly testified that this incident was discussed among the strikers, and that it made them conclude to ''keep staying there, and to be more united. . . . And . . . stay longer.''

[11] There are two gates in the fence which surrounds the Respondent's facility. In order for the witnesses to more easily describe the locality of events, the gates were termed North and South. At trial, witnesses were shown a diagram of Respondent's facility and asked to point out their location during any events to which they testified.

[12] According to Catalan, the forklift has a very high seat, which allows the driver visibility even when carrying a tall load. Catalan testified that Nevill's line of vision was higher than it would be if Nevill were standing on the ground.

5. The alleged assault on employee Javier Soriano

Javier Soriano credibly testified that on March 13, 1990, he was engaged in picketing at Respondent's North gate. Nevill and Butterfield approached the gate to close it. Nevill took the North door, Butterfield the South door, and they started to walk them closed.[13]

According to Soriano, at that time, Butterfield said, ''You f—g p—. . . . You should go and look for a job. . . . You got your little mustache like peach fuzz. . . . You should put a k— around your mouth and get the f— out of here and look for a job.'' Soriano responded, ''F— you.''

According to Soriano's credible testimony, during this verbal exchange Nevill swung the gate at him. The gate struck him in the ribs and his leg, knocked the wind out of him, but did not knock him to the ground. As Soriano stumbled and grabbed his side, Nevill laughed, called him a ''crybaby,'' and told him to go cry to his lawyers.[14]

Rosales credibly testified that he was picketing at Respondent's facility at the time this incident occurred. Rosales was picketing at the South gate, but had observed Soriano and Butterfield talking, and Nevill get out of Butterfield's car, which was entering the gate. But, then Nevill and Soriano began having an exchange with raised voices. So, he began walking along the fence toward the North gate when he heard the verbal exchange at the North gate increasing in volume.

According to Rosales, as he arrived at the North gate he saw the gate swing out and strike Soriano. Rosales admitted that he did not see Nevill push the gate at Soriano. But he credibly stated that Nevill was the only person, besides Soriano, at the North gate when he arrived momentarily afterwards, and that, there being insufficient wind to cause the gate to swing closed, in his opinion the gate was swung by Nevill.

Rosales went on to credibly testify that discussion of this incident among strikers later that day led them to conclude that they should ''be more united, stronger, and stay there fighting.''

Although Nevill did not testify as to this incident, he did testify that normally during the strike, Butterfield and he would close the gates together. Nevill said the one with the stake had to be walked to its closed position, but that the other one could simply be ''let go'' or given a ''little push'' and it would go to the center by itself.

Jesus Vela Soriano, who was not present when the incident described above occurred, credibly testified that it was discussed among the strikers later on during the day it occurred. He stated that the strikers became ''more united'' as a result of the incident and its discussion.

6. Other general allegations

a. Javier Soriano credibly testified that sometime following the gate incident, Nevill accused a group of picketers of whistling at his wife. Nevill said, ''You f—ing a—. . . .

[13] According to the testimony, the gate is the type in which one door, or panel, has a stake which is placed in the ground at its closed position, and the door, when closed, acts as the support for the other door, which latches to the staked door.

[14] I also credit Soriano's testimony to the effect that Nevill stated that he would run over the families of strikers who were brought to the site.

Who is whistling at my wife. . . . Would you like me to go whistle at your house? . . . If you come and bring your f—families, I'll run over them. . . . I don't give a f—, you f—a—.''

b. Jesus Vela Soriano, employed as a welder prior to the strike, further credibly testified that around July 1990, he and others were picketing outside Respondent's gate. Nevill, laughing and yelling at the pickets, stood in Respondent's parking lot, near the North gate, and attempted to ignite a union sign with a match. At first the sign did not ignite. Nevill went into the building and, 5 minutes later, came back outside with another match, and made another attempt. This time the picket sign caught fire and Nevill yelled, ''m—f—s,'' and ''f—g UAW,'' as the sign burned.

7. The discharge of Lopez

On May 30, 1990, Agustin Godoy Lopez, employed as a grinder prior to the strike, was discharged. The Respondent discharged Lopez for swearing at Butterfield. Lopez admitted swearing at Butterfield. However, Lopez credibly claimed that he was only responding to Butterfield's swearing at him. According to Lopez, Butterfield swore at him on several occasions, throughout the course of the strike.

Jesus Vela Soriano credibly testified that he was picketing with Lopez at Respondent's North gate on the day Lopez was discharged. According to Soriano, when Butterfield arrived at Respondent's facility, he stopped his car and yelled ''m—f—er'' and ''f—ers'' at the picketers. Later that day, Butterfield came out to close the gate and repeated his remarks to the picketers. The picketers responded, ''f— you Jim.''[15] Butterfield went back inside Respondent's office, but returned to the gate, along with Nevill, approximately 20 minutes later and handed Lopez a discharge notice.[16]

Respondent's witnesses did not testify to this particular incident. However, Nevill testified generally that ''towards the end of the strike . . . there was an awful lot of exchange'' between the Respondent and the picketers. Respondent's questions of Lopez implied that Lopez had been previously warned about the use of such language directed toward Butterfield, but Lopez' denial[17] stands unrebutted. I found it credible in this testimony, as well as in his further testimony that Butterfield routinely provoked, or participated in, exchanges of gutter language with those picketing.

Jesus Vela Soriano testified that this incident was another of the matters spoken about by the strikers. According to him, the strikers, considering this incident together with the discharge of Lopez, concluded that they ''had to be united, . . . [t]o go forward, to keep on going'' with the strike.

8. The refusal to reinstate Ramirez

On August 2, 1990, Carlos Ramirez, employed as a painter prior to the strike, and one of the picket captains and a member of the Union's committee, resigned his position with the Respondent. Ramirez testified that during the strike he sought employment because he was experiencing financial problems.[18] On his job applications Ramirez indicated he was on strike. He believed that potential employers were turning him away because of his on strike status.

Accordingly, on August 9, so Ramirez testified, he submitted a ''resignation'' to Respondent in order to remove this impediment to securing other work. He claimed that he intended, following the strike's settlement, to return to Respondent's employ.

Ramirez testified credibly, and without contradiction,[19] that he told Respondent[20] why he was resigning, i.e., that he had some financial problems, and that he needed a job. Moreover, Ramirez credibly testified that while he was at Respondent's office, submitting his ''resignation,'' he was asked by Nevill to accept an offer of employment with Respondent, and replied that, ''I just said that I didn't want to have any problem with the company or the union.'' Specifically, Ramirez credibly testified that he would have considered an offer of reinstatement, but not while the strike was still in progress.

According to Ramirez, a week after his resignation he was able to secure other employment. He began work at the new employer on August 17, the same date that the strike was ended.

D. *Analysis and Conclusions*

1. The violation of Section 8(a)(5)

The obligation to bargain collectively, though rarely satisfied by application of rote or formula, is defined in Section 8(d) of the Act, set forth above.

Here, however, we deal with the very sort of conduct which is deemed so patently contrary to a genuine desire to reach agreement that the fact of its occurrence will sustain a finding of a per se violation.

Any action which flies in the face of the 8(d) requirements has long been considered to be a per se violation of the Act's bargaining duty, regardless of any other good-faith activities. If an employer, during negotiations, makes unilateral changes in a merit wage policy, which is deemed to be a ''mandatory'' subject for bargaining, it will be held guilty of a per se violation of Section 8(a)(5). When faced with such a situation, the Supreme Court said:

> [A] refusal to negotiate in fact as to any subject which is within Section 8(d) and about which the union seeks to negotiate, violates Section 8(a)(5), though the employer has every desire to reach agreement with the union upon an overall collective bargaining agreement

[15] At trial, many of the witnesses referred to Gene Butterfield as ''Jim.'' According to the interpreter, there is no literal exact translation for the English name ''Gene.''

[16] The discharge, in pertinent part, read:

> You are discharged for engaging in serious picket line misconduct on May 30, 1990. . . . you called Gene Butterfield. . . . m—f—er . . . . this type of behavior . . . will not be tolerated.

[17] While Lopez stated that he did not recall any such warning, I am satisfied that he was not being evasive, or purposely uncertain.

[18] The ''remarks'' section of Ramirez' separation notice indicates in typeprint, ''Financial purpose per Carlos.''

[19] Indeed, with the comment from Respondent's then counsel that his testimony was truthful.

[20] In the persons of ''Diana,'' ''Linda,'' and, of significance, Gene Butterfield.

and earnestly and in all good faith bargains to that end. [*NLRB v. Katz*, 369 U.S. 736, 743 (1962).]

As a result of Respondent's admission at trial of paragraph 10 of the third amended consolidated complaint, it is now undisputed that, from and after September 25, 1989, Respondent granted merit wage increases to employees, and that it did so pursuant to Respondent's merit wage increase program, all after failing and refusing to bargain collectively with the Union, or affording notice to the Union, about the wage increases.

While early indications were that Respondent would at least claim that its policy was put in effect following an impasse in negotiations, that proved not to be the case. Indeed, possibly in recognition of the effects of the testimony of Nevill, which showed that Respondent's ''policy'' was completely administered at Respondent's discretion, Respondent amended its answer at trial to admit the allegation pertaining to this violation.

Since, as shown above, Respondent had a duty to its employees to bargain collectively with their duly designated and selected representative before making unilateral changes in their wages, hours, and working conditions, I find that Respondent's failure and refusal in this regard was, and is, violative of Section 8(a)(5) and (1) of the Act. See *Colorado-Ute Electric Assn*., 295 NLRB 607 (1989). Respondent shall, accordingly, be ordered to cease and desist from granting further increases of this sort, and to bargain over the merit pay plan, a mandatory subject of bargaining, as well as its implementation as to amounts and timing of employee increases in pay. *NLRB v. Katz*, 369 U.S. at 746–747 (1962), and *McClatchy Newspapers*, 299 NLRB 1045 (1990). Respondent, however, shall not be ordered to reduce the pay of any employee who has received such a raise in pay, unless requested by the Union.

2. The violations of Section 8(a)(1) at the meetings of November 17

I have found that in the meetings of November 17, 1989, Respondent, through Nevill, told employee Javier Soriano, and others who attended a meeting on that date that supporting the Union is like ''being in Russia,'' that he ''was never going to [allow it to] come in his plant,'' and that he would ''spend his last cent'' to keep his plant from becoming unionized. Further, I have found that Nevill told employee Genaro Hernandez, and others who attended another meeting on that date, that if they went on strike they would be fired and immediately replaced, and that Nevill promised ''help,'' inferentially referring to wage increases, to employees who stayed out of the Union.

I find and conclude that such statements were violative of Section 8(a)(1) of the Act. Certainly, it is so generally considered threatening as to axiomatic to state that those who engage in activity protected by the Act will be disciplined. And to threaten that those who peacefully support an economic strike will be automatically fired as a result is unlawful. Cf. *Overnite Transportation Co*., 296 NLRB 669 (1989). Similarly, to threaten that the employer will make the employees' efforts to secure representation an exercise in futility is unlawful. *Kona 60 Minute Photo*, 277 NLRB 867 (1985).

However, given the language difficulties present throughout the presentation of this case, and the apparent vagueness attending the testimony that a wage increase would be given those who did not support the Union, or that support for the Union would be akin to being in Russia, I find and conclude that the evidence is too ambiguous to permit a finding of a violation in these respects.

3. The forklift incidents

With respect to the incident in mid-January 1990, my consideration of the evidence as a whole leads me to conclude that Nevill either purposefully or recklessly drove the forklift into employee Catalan, as Catalan peacefully patrolled the picket line. My view of this is especially true as to the second such incident of that day. After all, when the second occurred, the first such incident had been the subject of a protest only a short time before, and could not have been out of Nevill's consciousness so quickly. Indeed, as I have accepted Catalan's testimony that Nevill warned him out of the way, but drove into him without affording adequate opportunity for Catalan to step aside, I find that at least the second incident of that day was intentionally caused by Nevill. That he would smile over the incident, apparently finding it amusing, as credibly testified to by Catalan, seems entirely consistent with the demeanor exhibited by Nevill at trial.

I need not characterize Nevill's conduct as an ''assault.'' It is sufficient that it should interfere with, threaten, or coerce employees in the exercise of their rights under Section 7 of the Act. I find that it did so, and was, therefore, violative of Section 8(a)(1) of the Act, and not de minimis, as argued by Respondent.

4. The gate incident

Similarly, the incident of March 13, 1990, with the gate being closed by Nevill in such a way as to swing into, and strike, an employee as he picketed, is found by me to violate Section 8(a)(1) of the Act. The credible evidence is that Nevill swung the gate, not as usual, i.e., ''walking it shut,'' but with sufficient force or quickness as to cause it strike employee Javier Soriano's body.

While I accept Respondent's argument that the force of this blow was not sufficient to cause true bodily injury, I do not conclude that the conduct, as opposed to its results, was de mimimis.

Accordingly, as I conclude that such conduct would reasonably interfere with, restrain, coerce or threaten strikers engaged in lawful activity, I also find that the conduct was violative of Section 8(a)(1) of the Act.

5. Other allegations of Section 8(a)(1)

I find no violation in Nevill's having stated to Javier Soriano that, if strikers brought their families to the picket line, he would run over them. I find that the ''threat'' lacks sufficient immediacy to rise to the level of a violation.

Similarly, the burning of the picket sign by Nevill, which I find to have occurred, as testified to by Jesus Vela Soriano, did not rise to the level of a threat or coercion. The value of the sign was not established, but was obviously trivial. Given the evidence of routine, free exchange of obscenities between Respondent's officers and the pickets, I cannot find that such an incident would reasonably be seen as anything

other than ''business as usual'' or that it would tend to coerce, restrain, or threaten employees.

6. The discharge of Lopez

However, I find that the routine nature of the exchange of profane and obscene commentary between pickets and Respondent's management has just the opposite effect on my consideration of the discharge of Augustin Godoy Lopez on May 30, 1990. The very fact that Respondent routinely participated in such exchanges, as has been shown to my satisfaction, serves in my mind to insulate employees from discipline for engaging in conduct which would otherwise be clearly privileged by an employer.

Thus, since that is the very conduct for which Lopez was discharged, according to Respondent's own records, and since Lopez was at the time engaged in lawful, protected picketing, I find that Lopez' use of profane and obscene language directed toward his employer did not deprive him of the protection of the Act.

It follows that I must, as I do, find and conclude that his discharge was discriminatory, and was violative of Section 8(a)(3) and (1) of the Act.

It should be clearly understood that I do not conclude that an employee has a right to call his employer obscene or profane names. Here, I find only that an employee has a right to peacefully picket, and, further, in circumstances where the employer, not only tolerates, but also himself engages in, and helps to create an atmosphere tolerant of, profanity and obscenity, the employer cannot suddenly turn around and use the offensive language, quite similar to that used by the employer itself, as an excuse to discipline an employee. Cf. *Visador Co*., 303 NLRB 1039 (1991); *Mini-Togs, Inc*., 304 NLRB 644 (1991); and *United Enviro Systems*, 301 NLRB 942 (1990).

7. The nature of the strike

It is unquestioned that the strike which began in November 1989 in this case was economic in nature.[21] Counsel for the General Counsel argues, however, that it was converted to an unfair labor practice strike by virtue of the unfair labor practices of Respondent from and after the date of the forklift incidents in mid-January 1990.[22]

The Board requires that there be a showing of more than mere coincidence in time between unfair labor practices and a strike in order to convert the nature of a strike. The General Counsel must establish that the unlawful conduct was a factor (not necessarily the sole or predominant one) that caused a prolongation of the work stoppage. *C-Line Express*, 292 NLRB 638 (1989). The Board commented that the record will sometimes afford an opportunity to evaluate the employees' knowledge of, and subjective reactions to, an employer's unlawful conduct, in order to confirm that it interfered with a settlement of the strike, and thus prolonged the work stoppage.

That is the case with this record. There is credible evidence of the intent of employees in continuing the strike, i.e., that the actions of the employer, which I have found unlawful, made them more united and determined to continue their protected strike activity. This credible evidence was not only unrebutted, but was even substantially unchallenged by cross-examination at the time it was offered.

Employee Rosales testified concerning the forklift incidents in mid-January 1990. As shown above, I have have accepted as credible his testimony that employees discussed this among themselves, and that they were thereby made more determined to carry on with the strike.

Employee Jesus Vela Soriano, similarly, testified that the gate incident on March 13, 1990, made the employees, following a discussion of it among themselves, more united in their continuation of the strike.

In the face of this evidence, despite its somewhat conclusionary and self-serving nature, I see no warrant to ignore the employees' expressions of support for continuing the strike, following, as they did closely on the heels of employer unfair labor practices. The evidence referred to above clearly establishes the necessary ''causal connection'' between the unfair labor practices I have found to have been committed and the employees' decision to remain on strike. *Buffalo Concrete*, 276 NLRB 839, 841 (1985); *Tufts Bros., Inc*., 235 NLRB 808, 811 (1978); *Typoservice Corp*., 203 NLRB 1180 (1973); compare *Burlington Homes*, 246 NLRB 1029 (1979).

Accordingly, I find and conclude that the strike was converted to an unfair labor practice strike as of mid-January 1990.

8. The refusal to reinstate strikers

As found above, and as is not disputed, after striking for approximately 9 months, the numbers of the 45–50 employees who began the strike had dwindled to 20–25 remaining on strike.

At that time, the Union made an unconditional offer to return to work, on behalf of all strikers. However, despite the admitted fact that it had not hired permanent replacements for any of the strikers, Respondent failed and refused to reinstate any of the strikers.

Such requests may be ignored by an employer at its own peril, even if they are made collectively for all employees by the Union's representative, as here. *Colonial Haven Nursing Home*, 218 NLRB 1007, 1011 (1975).

Here, in light of my finding that the strikers were unfair labor practice strikers, from and after mid-January 1990, the failure and refusal of Respondent to honor their unconditional offer to return to work from and after the Union's submission of a demand on their behalf in mid-August 1990, violated Section 8(a)(3) of the Act. *National Tape Corp*., 187 NLRB 321, 325 (1970). It shall, accordingly, be provided that Respondent must provide an appropriate remedy for these violations.

9. The refusal to reinstate Ramirez

One of the strikers, Ramirez, is claimed by Respondent to have resigned, i.e., to have abandoned whatever right to reinstatement he may have had.

I cannot agree. For, while it cannot be denied that Ramirez did, in fact, submit a letter of resignation, the Board has stated that, in circumstances where an employer knows that an employee ''resigns'' as a prerequisite to securing even in-

[21] Nor is it argued that the implementation of the merit wage increase plan converted the strike to an unfair labor practice strike.

[22] Though it may have little effect on the outcome of this case, since Respondent admitted at trial that it hired no permanent replacements during the course of the strike.

terim employment elsewhere, the resignation may not be said to establish that the employee necessarily made a decision permanently to terminate his employment, should he subsequently be offered reemployment. Accordingly, the Board has held that, in these circumstances, and absent any other evidence of permanent employment termination, the mere submission of a ''resignation'' does not constitute an unequivocal abandonment of the employee's status as a striker, or of his right to further employment with the employer. *S & M Mfg. Co*., 165 NLRB 663 (1967).

As found above, Ramirez informed Respondent that he was ''resigning'' in order because he had financial problems and needed a job. Further, when solicited to abandon the strike by Nevill at the time he submitted his ''resignation,'' Ramirez told Nevill that he ''just didn't want any problem with the company or the union.''

Thus, it seems clear that Respondent knew or should have known that Ramirez had some sort of interest in the way that the strike was continued and/or concluded. Otherwise, Ramirez would have had no interest in ''trouble'' from either party to the strike, for neither would have had any power, had he secured permanent employment elsewhere, to give him any sort of ''trouble.''

Accordingly, I find and conclude that Ramirez has not been shown to have evidenced an unequivocal intent to abandon the strike by submitting a resignation document to Respondent, and should be considered to be among those employees who are entitled to reinstatement from Respondent as a result of the unconditional offer of the Union set forth above.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees employed by Respondent at its facility located in Sylmar, California, constitute a unit appropriate for the purposes of collective bargaining:

> Included:
>
> > All full-time and regular part-time production and maintenance employees, including truck-drivers, welders, machine operators, painters, forklift drivers and fabrication employees employed by Refuse Compactor Service, Inc., at its location at 12776 Foothill Blvd., Sylmar, California,
>
> Excluded:
>
> > Office clerical employees, sales employees, confidential employees, managerial employees, professional employees, guards and supervisors as defined in Act.

4. At all times material herein the Union has been the exclusive collective-bargaining representative of all the employees in the unit described above by virtue of Section 9(a) of the Act.

5. By failing and refusing to engage in good-faith negotiations, by unilaterally implementing changes in the wages, hours, and working conditions of employees at a time when no impasse existed, Respondent has violated Section 8(a)(5), (1), and (d) of the Act.

6. By threatening to automatically fire all employees who chose to participate in an economic strike, by threatening to cause the Union and protected activities of employees futile, by running a forklift into an employees peacefully picketing Respondent's premises, and by closing a gate in such a way as to cause it to strike an employee while the employee was peacefully picketing Respondent's premises, Respondent has violated Section 8(a)(1) of the Act.

7. By discriminatorily discharging its employee Augustin Godoy Lopez on or about May 30, 1990, Respondent violated Section 8(a)(3) and (1) of the Act, and by failing and refusing to grant timely reinstatement to unfair labor practice strikers on their unconditional request to return to work, Respondent violated Section 8(a)(3) and (1) of the Act.

8. The strike of Respondent's employees which took place between November 17, 1989, and August 17, 1990, was converted to an unfair labor practice strike by the unfair labor practices of Respondent from and after mid-January 1990, and the employees who continued to participate in the strike were unfair labor practice strikers.

9. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by implementing unilateral changes in the wages, hours, and working conditions of its employees at a time when no genuine impasse existed, it shall be required that Respondent, on request, bargain with the Union as the exclusive representative of the employees in the appropriate unit concerning terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement; further, it shall be required that, on the Union's request, and consistent with this decision, Respondent rescind any unilateral changes made effective on and after November 17, 1989, and, consistent with this decision, continue to give effect to those terms and conditions of employment previously in effect at its facility in Sylmar, California, for the employees in the previously described unit, until Respondent and the Union reach a good-faith impasse, execute a new collective-bargaining contract, or the Union refuses to bargain in good faith. Consistent herewith, Respondent shall be required to make employees whole for any losses they may have suffered by virtue of its unlawful unilateral changes in their wages, hours, and working conditions.

Having found that Respondent discriminatorily discharged its employee Augustin Godoy Lopez on or about May 30, 1990, and that Respondent failed and refused from and after August 17, 1990, on their unconditional request to return to work, to reinstate its striking employees, it shall be required that Respondent offer to Augustin Godoy Lopez and to all striking employees immediate and full reinstatement to their former positions, and make them whole for any loss of earnings or benefits suffered as a result of Respondent's discrimination, and refusal to honor their unconditional request to return to work, with interest thereon, to be computed in the manner prescribed *F. W. Woolworth Co*., 90 NLRB 289

(1950). Interest thereon shall be computed as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See generally *Isis Plumbing Co*., 138 NLRB 716 (1962).

Respondent shall also be required to expunge from its files all references to its unlawful discharge of Augustin Godoy Lopez, and, also, to its refusal to reinstate its striking employees on their unconditional offer to return to work on July 10, 1987, and to notify all affected employees in writing of this expunction, and that said action or notations on their personnel files shall not be used as a basis for future personnel actions concerning them. See *Sterling Sugars*, 261 NLRB 472 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[23]

ORDER

The Respondent, Refuse Compactor Service, Inc., Sylmar, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with loss of employment.

(b) Advising employees that their unionization efforts will be futile.

(c) Promising or granting benefits or improvements, such as a new wage or compensation plan, or increases in wages, in order to discourage employees from supporting the Union; provided, however, that nothing contained herein shall be construed as authorizing or requiring the us to vary or abandon any benefit previously conferred.

(d) Refusing to bargain collectively, on request, concerning rates of pay, wages, hours, and other terms and conditions of employment, in good faith, with The United Automobile, Aerospace and Agricultural Implement Workers of America, Local 179 (the Union) which is the exclusive bargaining representative for employees in the following appropriate unit:

> Included:
>
> All full-time and regular part-time production and maintenance employees, including truck-drivers, welders, machine operators, painters, forklift drivers and fabrication employees employed by Refuse Compactor Service, Inc., at its location at 12776 Foothill Blvd., Sylmar, California,
>
> Excluded:
>
> Office clerical employees, sales employees, confidential employees, managerial employees, professional employees, guards and supervisors as defined in Act.

(e) Refusing to reinstate its unfair labor practice strikers pursuant to their unconditional offer to return to work.

(f) Unilaterally changing terms and conditions of employment for its employees at its facilities described in the description of the unit, above, by implementing unilaterally the terms of a merit wage increase plan, without consultation with the Union and without affording it an opportunity to bargain about such changes.

(g) Discriminatorily discharging employees because they have engaged in union or other protected, concerted activities.

(h) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.[24]

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement. The appropriate unit is:

> Included:
>
> All full-time and regular part-time production and maintenance employees, including truck-drivers, welders, machine operators, painters, forklift drivers and fabrication employees employed by Refuse Compactor Service, Inc., at its location at 12776 Foothill Blvd., Sylmar, California,
>
> Excluded:
>
> Office clerical employees, sales employees, confidential employees, managerial employees, professional employees, guards and supervisors as defined in Act.

(b) Offer Augustin Godoy Lopez, and to each of the employees who remained on strike and who were not reinstated to their former positions on the unconditional offer of the Union on their behalf to return to work following the strike, if it has not already done so, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of Respondent's discriminatory discharge, and/or failure to honor their requests to return to work from an unfair labor practice strike, in the manner set forth in the remedy section of the decision, dismissing, if necessary, any employees hired on or after mid-January 1990 when the unfair labor practices of Respondent converted the strike from an economic strike to an unfair labor practice strike.

(c) Remove from its files any references to the unlawful refusals to reinstate, and to the unlawful discharge, and the unlawful refusals to reinstate, and provide the affected employees, in writing, assurance that it has done so, and that its action against them will never be used against them in the future in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records and reports, and all other records necessary to analyze the

[23] All outstanding motions inconsistent with the terms of this Order, if any, are hereby overruled. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[24] I provide for a broad order herein in view of the broad variety of unfair labor practices committed by the Respondent, which, in my opinion, demonstrate the Respondent's disregard for the statutory protections afforded employees by the Act. In such circumstances a broad order is warranted. See *Hickmott Foods*, 242 NLRB 1357 (1979).

amount of backpay due under the terms of this recommended Order.

(e) Post at its referred to above, in Sylmar, California, copies of the attached notice marked ''Appendix.''[25] Copies of the notice, which shall be written in both English and in Spanish, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In order to ensure that affected employees shall be provided actual notice of this decision, copies of the notice, in both English and in Spanish, shall be mailed by Respondent to each of the employees who engaged in the strike referred to in this decision, and proof of such mailing shall be provided by Respondent to the Regional Director.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[25] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''